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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.
No. 391

THE PEOPLE OF THE STATE OF CALIFORNIA, on the Relation of ARDY V. BARTON,

Petitioner,

vs.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a foreign corporation, and ASSOCIATED INDEMNITY CORPORATION, a domestic corporation,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second District, Division One of the State of California.

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Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal, Second District, Division One of the State of California.

The People of the State of California prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second District, Division One of the State of California entered in the above-entitled case on April 13, 1955.

Citation to Opinion Below.

The opinion of the District Court of Appeal is printed in the appendix hereto and is reported in 282 P. 2d 559, and in 132 A. C. A. 377, April 29, 1955.

Jurisdiction.

The judgment of the District Court of Appeal was filed April 13, 1955. Rehearing was denied May 9, 1955. Hearing in the California Supreme Court was denied June 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

How Federal Question Is Presented.

The federal questions of freedom of speech and press, clear and present danger, and prior restraint were first raised in the pleadings in the California Superior Court, the court of first instance. This was done by the respondents who filed a demurrer to the petitioner's complaint. The demurrer was sustained on those grounds, and the petitioner appealed to the District Court of Appeal which sustained the lower court's ruling. See appendix for opinion. Certiorari is directed to the District Court of Appeal and not the Supreme Court because the District Court of Appeal opinion is the highest judgment in the State courts since the California Supreme Court denied a hearing.

Questions Presented.

1. Whether the Constitutional guarantees of free speech and press immunize one against the charge of feloniously attempting to influence a juror in the following circumstances:

Where the accused is an automobile casualty insurance company constantly and widely engaged in personal injury jury trials, and where the accused intentionally and deliberately attempts to influence a juror

with respect to his verdict in such a case by the following plan: the accused places an advertisement in a national magazine having one of the highest circulation figures in the United States with the expectation and purpose that the juror will read it. In the advertisement the accused addresses the juror as a juror and tells the juror that the more he awards the plaintiff the more it is going to cost said juror in higher prices and premiums. A juror, Hazel Engelman, receives the advertisement-message, reads it, and is so moved thereby that she takes it to the juryroom in the personal injury case which she is then trying and pins the advertisement-message on the wall. All the jurors read and discuss it and then render a verdict in the said case. The only purpose of the accused in publishing the advertisement and causing it to be sent through the mails to regular subscribers and purchasers is to influence the juror with respect to his verdict in personal injury cases. There is no conflict of evidence.

2. Whether it is necessary to make a showing of clear and present danger in such a case.

3. Whether such a case makes a showing of clear and present danger.

4. Whether a fine, or penalty or restraining order constitutes a prior restraint against the accused in such a case.

Statutes Involved.

1. Free speech and press provisions of the First and Fourteenth Amendments of the United States Constitution.

2. California Penal Code, Section 95, Attempts to influence jurors.

"Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator, or umpire, or appointed a referee, in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him, either:

"One. By means of any communication, oral or written, had with him except in the regular course of proceedings;

"Two. By means of any book, paper, or instrument exhibited otherwise than in the regular course of proceedings;

"Three. By means of any threat, intimidation, persuasion, or entreaty; or,

"Four. By means of any promise, or assurance of any pecuniary or other advantage;

"—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years."

Statement.

This is an action begun on the relation and information of the relator. The Attorney General of the State of California brought an action in *quo warranto* against the charters of two insurance companies for violating the laws of the State of California. This is a civil suit and not a criminal action. The cause of action however, depends upon whether the insurance companies have violated the laws of the State. The action was filed in the State Superior Court on November 13, 1953. The respondent insurance companies filed a demurrer on the

ground of Constitutional protection of free speech and free press. The demurrer was sustained. The complaint was amended to show, among other things, that the respondents attempted to influence a specific juror in a specific case. This amended complaint was again demurred to on the same grounds of free speech and press as well as no clear and present danger shown and the action constituted a prior restraint. The demurrer was sustained again by the Superior Court. The petitioner refused to amend and took an appeal to the District Court of Appeal of the State of California. There was no trial on the facts. All the facts were deemed true as alleged and the case was determined purely as a matter of law on the pleadings.

The District Court of Appeal sustained the judgment of the court below stating that the respondents were protected by the 1st and 14th amendments of the Constitution, that there was no showing of clear and present danger, and that the action constituted a prior restraint. It filed its opinion on April 13, 1955. The petitioner applied for a rehearing which was denied Petitioner applied for a hearing in the Supreme Court of California and was denied on June 16, 1955.

Reasons for Granting the Writ.

1. Conflict.

There is a direct conflict between the California District Court of Appeal opinion printed in the appendix hereof and reported in 132 A. C. A. 377, 282 P. 2d 559 and *Beauharnais v. Illinois,* 343 U. S. 250.

In the *Beauharnais* case the defendant was convicted of violating the Illinois group libel law by distributing

leaflets proposing the adoption of segregation laws and portraying Negroes as being depraved, criminal and unchaste. The trial court refused to instruct the jury on clear and present danger. The Supreme Court held that the lower court was correct and said that like lewd and obscene speech, this type of speech was not entitled to constitutional protection. The Court reasoned that libel of an individual was a common law crime and thus criminal in the colonies. It stated that today every American jurisdiction has such a law.

The reasoning of the *Beauharnais* case is equally applicable to attempts to influence jurors. This prohibition is firmly imbedded in the earliest beginnings of the law. It protects a far more important aspect of societal existence than does the law against libel. If the respondents were actually intending and attempting to influence jurors, as the demurrer admits, by a plan of mass advertising and saturation mailing, they ought to be subject to the rule of the *Beauharnais* case.

2. Importance.

The legality of sending or communicating extra-judicial advice and information to jurors is of extreme importance to the legal world, to newspapers and advertisers, to insurance companies and bar associations and to all the personal injury claimants in the United States, to every litigant who seeks relief in our courts by the constitutional right of jury trial. The very nature of jury trial is at stake in this question.

In the last two years, bar associations all over the country have rendered exhaustive reports, recommendations and resolutions on the subject. The New York

Bar Association, The American Bar Association and the 1953 Convention of Delegates of the California Bar Association have been most notable among these.

In March 1954, the Superior Court Judges of Sacramento County, California dismissed a jury commissioner because he admitted that he had talked to prospective jurors about so-called excessive verdicts and had shown them the very same communications here in question. Several cases have arisen throughout the nation from this type of campaign and an authoritative decision is needed to settle and clarify the problem.

3. The District Court of Appeal Opinion Is Erroneous.

a. The case should have been determined on the basis of whether the respondents had attempted to influence the juror Hazel Engelman with respect to her verdict in *Smith v. Ledbetter*. The complaint alleged that respondents had so attempted on the basis of *People v. Connors*, 70 Cal. App. 315 (233 Pac. 362) where the court held that since Defendant intended to influence all of that class, he also intended to influence the specific juror named in the complaint who was a member of that class.

Therefore, if a trial court had found that as a matter of fact, the respondent intended to attempt to influence said juror or jurors, the rule in the *Beauharnais* case would have found against the respondents.

b. According to the *Beauharnais* case, if the respondents were actually attempting to influence the juror, clear and present danger need not have been shown.

c. However, clear and present danger existed in the fact that the juror received the communication as planned, that she took it to the juryroom and pinned it up on the

wall where all the jurors saw it and discussed it and then decided the case. It is within the principle of *Doss v. Lindley,* 53 Fed. Supp. 427, in that it was an *actual interference with the administration of justice.*

d. To have fined the respondents would not have constituted a prior restraint.

The gravamen of the action is not the mere publication but the communication with the juror which the respondents intended to do. That is a principal difference between the contempt action in the *Bridges* case and the criminal attempts to influence a juror in *People v. Connors, supra.*

The *Bridges* case should be confined strictly to contempt cases and the *Beauharnais* case should be applied to criminal cases of the sort involved here. The case at bar should have been decided under the rule of the *Beauharnais* case and not *Bridges v. California,* 314 U. S. 252.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDMUND G. BROWN,
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Deputy,
Attorneys for Petitioner,

HENRY G. BODKIN,
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Attorneys for Relator.

APPENDIX.

Opinion of the District Court of Appeal.

[Civ. No. 20659. Second Dist., Div. One. Apr. 18, 1955.]

The People *ex rel.* Ardy V. Barton, Appellant, v. American Automobile Insurance Company (a Corporation) *et al.*, Respondents.

Appeal from a judgment of the Superior Court of Los Angeles County. Philbrick McCoy, Judge. Affirmed.

Proceeding *in quo warranto*. Judgment of dismissal on plaintiff's failure to amend after general demurrer was sustained to first amended petition, affirmed.

Edmund G. Brown, Attorney General, and Charles A. Barrett, Deputy Attorney General, for Appellant.

Ardy V. Barton, *in pro. per.*, Henry G. Bodkin and Jerry Giesler for Relator.

Parker, Stanbury, Reese & McGee, Raymond G. Stanbury, Pillsbury, Madison & Sutro, A. B. Tanner and Charles F. Prael for Respondents.

WHITE, *P. J.*—This is an appeal by plaintiff from a judgment for defendants, entered upon plaintiff's failure to amend after a general demurrer was sustained to plaintiff's first amended petition *in quo warranto*.

Defendants were insurance companies authorized to do and doing business in the State of California. Included in the business of defendants was the writing of policies of insurance covering negligence of automobile drivers.

In the first amended petition *in quo warranto*, plaintiff alleged that defendants did cause to be published in various nationally distributed magazines, including "Life" and

"The Saturday Evening Post," advertisements relating to the subject of excessive jury verdicts.

Attached to the amended petition were photostatic copies of the advertisements upon which plaintiff's petition was based.

On the first advertisement so set forth (marked Exhibit "A"), appears the picture of a woman holding a letter in her hand and beneath the picture appears the following:

"Me? *I'm* Paying for Excessive Jury Awards?

"Yes, Mrs. Jones, you pay for liability and damage suit verdicts whether you are insured or not.

"For example, higher insurance rates paid by the folks who helped fill your market basket—farmer, processors, truckers, wholesalers and retailers—are reflected in your grocery bill.

"You see, claims against insurance companies are paid out of policyholders' premiums. When jury awards are excessive, all business firms' premiums must be increased.

"And since insurance premiums are part of the overall cost of doing business, higher premiums must be passed on to you and every other member of the buying public through higher prices.

"Next time you serve on a jury, remember this: "When you are overly generous with an insurance company's money, you help increase not only your own premiums, but also the cost of every article and service you buy.

"Most claims for damages are legitimate and reasonable, and are amicably settled out of court. However, as jurors tend more and more to give excessive awards in cases that do go to court, such valuations are regarded as

establishing the 'going' rate for the day-to-day out-of-court claims all of which means increased insurance premium cost to the public.

"AMERICAN-ASSOCIATED INSURANCE COMPANIES.

"American Automobile Insurance Company—Associated Indemnity Corporation—St. Louis 2, Missouri."

On the next advertisement (marked Exhibit "B") appears the picture of a jury being sworn to try a case, below which appears the following:

". . . A True Verdict Render According To The Law and the Evidence.

"Jury service is often a difficult responsibility because, when making decisions, we always are tempted to listen to our hearts as well as our heads.

"But the Juror's Oath demands that jurors decide 'according to . . . the evidence.' Jurors sometimes forget this. Rules by emotion rather than facts, they arrive at unfounded or excessive awards . . . . verdicts occasionally even higher than requested!

"These men and women may be scrupulously honest. But as jurors, they feel in their hearts that the injured person—although he may have caused the accident—is entitled to an award.

"Because insurance rates depend on claim costs, these honest jurors cost millions of policyholders, including themselves, countless extra dollars in premiums every year.

"When you, as a juror, sit in judgment on a suit involving personal injuries, be fair with the public's—and your—money. Reach a decision according to the evi-

dence." Then follows the same language as appears in the last two paragraphs of Exhibit "A."

The third advertisement (marked Exhibit "C") presents the picture of an officer sitting outside a closed jury room, and below which appears the following:

"Your Insurance Premium is Being Determined Now.

"This could be any courtroom in the country—Behind the locked door, twelve men and women are reaching a verdict involving a defendant protected by a casualty insurance company. What they decide affects your pocketbook.

"All claims against insurance companies have to be paid out of funds created by premiums from policyholders. When these funds are insufficient, insurance rates must be increased.

"Casualty insurance companies have been losing an average of $11 on every $100 of earned automobile liability premiums. More accidents are partly responsible. So are excessive jury awards, rendered by jurors who feel they can afford to be generous with the "rich" insurance company's money. Actually jurors who are responsible for awards in excess of what is just and reasonable are soaking *you* by raising insurance rates." This is followed by a repetition of the statements contained in the last two paragraphs of the above Exhibit "A."

In the fourth advertisement (marked Exhibit "D") is found a photograph of a father and son engaged in conversation, and below which appears the following:

"Bill Set Me Straight on Jury Awards.

"Bill's my son—a senior in law school. Last night I told him about my recent experience as a juror.

"As a businessman, I knew the woman involved in the trial was legally at fault. She walked into a moving car. But she was a widow with a child to support. And I felt certain that the driver of the car was insured.

"The doctor said that the widow wouldn't be able to hold down a steady job for at least a year, so we awarded her a healthy sum. After all, her child must eat.

"But the law, said Bill, 'clearly states that the verdict must be based on legal liability, fault for the accident, as determined by the evidence.'

" 'The insurance company can afford to pay,' I protested.

" 'But claims,' argued Bill, 'must be paid out of premiums belonging to thousands of policyholders—including widows, too. And don't forget, when premium collections do not cover claims, everybody's insurance rates—including yours—have to go up.'

"You know, sometimes it pays to listen . . . even to your son." Following this is the same wording as contained in the last two paragraphs of the aforesaid Exhibit "A."

Exhibit "E," also attached to plaintiff's petition, is a page taken from "Shop Talk," a publication apparently sponsored by "American-Associated Insurance Companies," of St. Louis, Missouri. The page contains an article upon the campaign being conducted "To combat the important problem of unjust jury awards," and in the lower left-hand corner reference is made to the above-mentioned advertisements in "Life" and "Saturday Evening Post," with the comment:

"More Than One Out of Every Three potential jurors will see at least one of these advertisements appearing in

Life and The Saturday Evening Post. Based on total readership-per-issue figures for each magazine more than 70,000,000 persons will see these messages."

It was further charged in the petition that the foregoing publications amounted to a contempt of the judicial process and a conspiracy formed with the intent to corrupt jurors.

The petition prayed for a restraint against further publication of said or similar matter of forfeiture of defendants' corporate rights in the State of California, or that defendants be required to pay a suitable fine as punishment.

Defendants filed a general demurrer on the grounds that the petition sought to violate and suppress respondents' right of freedom of speech and of the press guaranteed by the Constitution of the United States and by the Constitution of the State of California, and that the facts alleged were insufficient to show a violation of Penal Code, section 95, a contempt of the judicial process or a conspiracy or intent to corrupt jurors, or grounds for a proceeding in *quo warranto*. The demurrer was sustained with leave to amend. Plaintiff declined to amend and a judgment of dismissal was entered.

The theory of appellant in this proceeding is thus stated in its brief: "This appellant is the State of California, and if the conduct of a corporation, the creature of this State, is in violation of its penal statutes, this appellant, the State of California, may bring an action against the offending corporation for dissolution, fine, restraining order, etc., or any combination of these remedies." (Corp. Code, §4690; Code Civ. Proc., §803.)

Because we regard it as the main if not determinative issue presented by this controversy, we shall first give consideration to respondents' claim that their demurrer was properly sustained because this proceeding constitutes a form of prior restraint upon publication barred by the free speech and free press provisions of the federal and state Constitutions (U. S. Const., Amend. I and XIV, §1; Cal. Const., art. I, §9).

From time immemorial the most conspicuous feature of history has been the struggle between liberty and authority. Undoubtedly, the framers of our Constitution and Bill of Rights, as well as those who brought into being our own California Constitution, recognized that at the time of the adoption of these immortal documents, as in ages past, we are not without tragic proof that the exacted power of some governments to ignore the inalienable right of the individual to liberty of conscience and freedom of expression is the handmaiden of tyranny. In America, we have always felt and vigorously asserted that free speech is a natural and inherent right, and that it, and freedom of the press, are among the most sacred and vital rights of mankind. While the constitutional guarantee above referred to is a fundamental one and is couched in the broadest language, the right thus guaranteed is, of course, not without limit. One such limitation is that no person is permitted to impede or interfere with the orderly administration of justice. But, however, intemperate the language, false the charges, or unfair the criticism, they do not admit of judicial restraint or punishment unless there is an immediate, clear and present danger imperiling the administration of justice. The foregoing principles have been firmly established in the recent decisions of the Supreme Court of the United

States, and, interpreting as they do, a provision of the federal Constitution, are binding upon us.

In Bridges v. California, consolidated with Times-Mirror Co. v. Superior Court, 314 U. S. 252 [62 S. Ct. 190, 86 L. Ed. 192, 159 A. L. R. 1346], both petitioners had been found guilty of contempt and the Supreme Court of California had affirmed (Bridges v. Superior Court, 14 Cal. 2d 464 [94 P. 2d 983]; The Times-Mirror Co. v. Superior Court, 15 Cal. 2d 99 [98 P. 2d 1029].)

In the case of the newspaper, the facts were that two labor union members had been convicted of assault and the trial judge had pending before him applications for probation. Under these circumstances the newspaper discussed the merits of the case at length in its editorial columns, denounced practices relating to the behavior of the accused, and closed with the observation (314 U. S. 252, 272), "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

In the Bridges case, a motion for a new trial was pending in a labor dispute case. During the pendency of that motion Bridges telegraphed to the Secretary of Labor condemning the decision as "outrageous," and threatened he would call a Pacific Coast strike unless a new trial were granted.

In commenting upon the aforesaid cases, Mr. Presiding Justice Peters, speaking for the court in Turkington v. Municipal Court, 85 Cal. App. 2d 631, 642, 643, 644 [193 P. 2d 795], said: "In both cases the comment was about a pending case, and in both cases strong, intemperate and untrue remarks were made. The Supreme Court

of the United States assumed that in both cases the accused were attempting to influence the course of pending litigation in the trial court. In both cases the trial court found, and the Supreme Court of California affirmed the finding, that the acts had a reasonable tendency to interfere with the orderly administration of justice. Nevertheless, the judgment was reversed, the Supreme Court holding that, as a matter of law, the comments did not present a clear and present danger to the orderly administration of justice. The majority of the court (the decision was 5 to 4) pointed out that prior decisions had established the rule that the constitutional right to free speech must be protected unless the comments about a court or judge are of such a nature 'as to create a clear and present danger that they will bring about the substantive evils.' (P. 261 [314 U. S.].) At page 262 [314 U. S.] it is stated:

" 'Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," . . . it must be "serious," . . .

" 'What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished . . . For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a comand of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.'

"The court then refutes the argument that, regardless of the free speech provision, this country adopted the English common law on the subject of contempts where

a 'mere tendency to obstruct justice' is all that is required, and then stated (p. 270 [314 U. S.]):

"'. . . The substantive evil here sought to be averted has been variously described below. It appears to be double: disrepect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

" 'The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases.'

"At page 273 [314 U. S.] appears the following comment: 'In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a

restriction of free expression.' The court then held that the editorials and telegram did not create, as a matter of law, a clear and present danger.

"There thus emerges from the Bridges' case a rule that had been strongly hinted at in earlier cases, but now couched in the strongest and most positive language, to the effect that a false publication that merely tends to obstruct justice is not sufficient to justify the interference with the constitutional rights to free speech by punishment for contempt, and that there must accompany such tendency a clear and present danger of such obstruction. Such danger must be both 'imminent' and 'serious.'" (Emphasis added.)

Six years after rendition of the Bridges decision the Supreme Court reaffirmed the reasoning and conclusion therein contained in the case of Pennekamp v. Florida, 328 U. S. 331 [66 S. Ct. 1029, 90 L. Ed. 1295].

In the case just cited, Mr. Justice Frankfurter, discussing the responsibility of the press at pages 365, 366, had this to say:

"It should not and may not attempt to influence judges or juries before they have made up their minds on pending controversies. *Such a restriction, which merely bars the operation of extraneous influence specifically directed to a concrete case, in no wise curtails the fullest discussion of public issues generally. It is not suggested that generalized discussion of a particular topic should be forbidden, or run the hazard of contempt proceedings, merely because some phases of such a general topic may be involved in a pending litigation. It is the focused attempt to influence a particular decision that may have a corroding effect on the process of justice, and it is such comment that justifies the corrective process."* (Emphasis added.)

It would serve no useful purpose to here present a detailed analysis of other cases supporting the foregoing doctrine. Suffice it to say that the above principles are enunciated and approved in the cases of Craig v. Harney, 331 U. S. 367, 376 [67 S. Ct. 1249, 91 L. Ed. 1546]; Baltimore Radio Show v. State, 193 Md. 300 [67 A. 2d 497], certiorari denied, 338 U. S. 912 [70 S. Ct. 252, 94 L. Ed. 562]; Near v. Minnesota *ex rel.* Olson, 283 U. S. 697 [51 S. Ct. 625, 75 L. Ed. 1357].

It must also be remembered that appellant in this proceeding seeks to restrain respondents from further utterance of their sentiments on claimed excessive jury verdicts or to oust them from carrying on their corporate business in the State of California. Manifestly, this is an attempt at prior restraint upon publication and in essence amounts to censorship, denounced by the state and federal Constitutions in their protection of freedom of speech and press. The courts have held that a statute authorizing such proceedings in restraint on publication is not consistent with the conception of the liberty of the press as historically conceived and guaranteed. While, as heretofore pointed out, the right of free speech is not unlimited, no one's mouth may be closed in advance, as sought herein, for the purpose of preventing an utterance of his sentiments, however, mischievous the prospective results of such utterance. The right of free speech was his, but at all times he was responsible to the law for an abuse of that right (Near v. Minnesota *ex rel.* Olson, *supra; Dailey v. Superior Court,* 112 Cal. 94, 97, 99 [44 P. 458, 53 Am. St. Rep. 160, 32 L. R. A. 273]; Empire Theatre Co. v. Cloke, 53 Mont. 183 [163 P. 107, L. R. A. 1917E 383]; Northwestern Pac. R. Co. v. Lum-

ber & Sawmill Workers' Union, 31 Cal. 2d 441, 448, 449, 450 [189 P. 2d 277].) The principle underlying the rules enunciated in the cited cases is the inability to conceive how anyone can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so. We are persuaded that the *quo warranto* statutes in this state deal with forfeiture and suppression of corporate rights, and not with publications *per se*, and their use is not permitted to effect restraint upon publication—which is the essence of censorship.

The advertisements here in question amount to a generalized discussion of a particular topic—the claimed execessive awards in negligence cases. There is no effort made to influence a particular decision. As pointed out by respondents, "The gist of the four advertisements attached to the amended petition is that verdicts should be rendered " 'according to the LAW AND THE EVIDENCE.' " They protest excessive verdicts rendered on the assumption that ' "The insurance company can afford to pay." ' They point out that when jurors do not base their verdicts on the law and the evidence, but, in violation of their oath, upon an impulse to be 'overly generous with an insurance company's money'—the jurors, in violating their oath, hurt not just the insurance company but themselves and the public generally. To allege by way of a conclusion that a protest on behalf of the whole insurance industry and, according to the beliefs of many, on behalf of the public at large, is 'presently dangerous of prejudicing and corrupting' jurors, is to reject every reasonable hypothesis from the facts pleaded."

Appellant relies heavily upon the case of People v. Connors, 70 Cal. App. 315 [233 P. 362], in which a

conviction under Penal Code, section 95, was reversed because of an erroneous instruction. Upon a retrial defendant was again convicted resulting in an affirmance of the judgment (77 Cal. App. 438 [246 P. 1072].) In the cited case, Connors caused copies of a multigraphed letter to be circulated promiscuously in Sacramento County during the pendency of a series of criminal syndicalism cases and during the actual trial of one. The letter strongly criticized the law under which the cases were prosecuted, attacked the prosecution witnesses as "a trio of degenerates" and defended the accused. The court said that the defendant would be subject to punishment if the letters were sent in the hope and expectation of thereby reaching many jurors and with the intent of corruptly influencing them. However, the Connors case is unlike the one now engaging our attention in that it did not involve the form of prior restraint sought here. There was no attempt to restrain future utterances. The publication in the Connors case related to particular and specific pending cases. And in neither appeal was the constitutional question presented. However, in the Connors case the court carefully distinguishes publications "for the sole purpose of creating public opinion" from publications corruptly attempting to influence jurors in specific pending cases, thereby anticipating the holding in Pennekamp v. Florida, *supra,* that only the extraneous influence "specifically directed to a concrete case" can be barred.

The reasoning in the case cited by us is conclusive in the case at bar. The language used in the questioned advertisements herein was not nearly so intemperate or unfair as that charged in the Pennekamp and Craig cases,

supra. When appellant's petition is read in the light of the cases cited, it seems to us the conclusion is inescapable that there is no sufficient showing therein of a "clear and present danger" to the orderly administration of justice, nor that any such danger was "serious" and "imminent." On the basis of the facts alleged in the amended petition, the maintenance of *quo warranto* proceedings against respondent must be held, under the authorities herein cited, to amount to an infringement upon rights guaranteed respondents by the federal and state Constitutions. Respondents' demurrer was therefore properly sustained.

The foregoing conclusion at which we have arrived renders it unnecessary to discuss or decide other points raised on this appeal.

The judgment is affirmed.

DORAN, *J*., and DRAPEAU, *J*., concurred.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 391

THE PEOPLE OF THE STATE OF CALIFORNIA, on the Relation of ARDY V. BARTON,
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vs.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a foreign corporation, and ASSOCIATED INDEMNITY CORPORATION, a domestic corporation,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 391

THE PEOPLE OF THE STATE OF CALIFORNIA, on the Relation of ARDY V. BARTON,
Petitioner,

vs.

AMERICAN AUTOMOBILE INSURANCE COMPANY, a foreign corporation, and ASSOCIATED INDEMNITY CORPORATION, a domestic corporation,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTIONS PRESENTED.

1. Whether section 95 of the California Penal Code, providing punishment for a person "who corruptly attempts to influence a juror," is to be construed as applying to a generalized discussion of excessive awards in negligence cases published as advertisements in "Life" and "The Saturday Evening Post."

2. Whether section 4690 of the California Corporations Code and sections 803 and 809 of the California Code of Civil Procedure are to be construed to permit quo warranto proceedings against corporations "'for dissolution, fine, restraining order, etc., or any combination of these remedies'"[1] to stop further publication of advertisements protesting generally excessive awards in negligence cases.

STATUTES INVOLVED.

The statutes involved, the provisions of which are set out in full in the appendix to this brief, are:

Calif.Pen.Code, sec. 95;

Calif.Corp.Code, sec. 4690;

Calif.Code Civ.Proc., secs. 803, 809.

STATEMENT OF THE CASE.

The respondent insurance companies caused to be published in various nationally distributed magazines, including "Life" and "The Saturday Evening Post," advertisements relating generally to the subject of excessive jury verdicts (Opinion, Pet., Appx., pp. 1-2).

The relator, Barton, in the name of The People of the State of California, filed an amended petition in *quo warranto* in the state court alleging the publication of the advertisements (Opinion, Pet., Appx., pp. 2-5). The amended petition also alleged that one Hazel Engelman,

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[1]Opinion, Pet., Appx., p. 6.

then serving as a juror, read and discussed one of said advertisements and "thumbtacked part of" said advertisement on a juryroom wall.

The petition charged that respondents had violated California Penal Code section 95, relating to attempts corruptly to influence jurors, and on that ground sought forfeiture of respondents' corporate rights under the California *quo warranto* statutes.

The respondents filed a general demurrer to the amended petition on the grounds, among others, that (1) the petition sought to violate and suppress respondents' right of freedom of speech and of the press guaranteed by (a) the Constitution of the United States and (b) the Constitution of the State of California; and (2) the facts alleged were insufficient to show (a) a violation of Penal Code section 95, or (b) grounds for a proceeding in *quo warranto*[2] (Opinion, Pet., Appx., p. 6). The demurrer was sustained with leave to amend. Petitioner declined to amend and a judgment of dismissal was entered.

The California District Court of Appeal affirmed the judgment of dismissal. The Supreme Court of California denied a hearing.

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[2]In its petition for a writ of certiorari petitioner states: "The respondent insurance companies filed a demurrer on the ground of Constitutional protection of free speech and free press. The demurrer was sustained" (Pet., pp. 4-5). Respondents' demurrer was not so limited. (See Demurrer of Defendants to First Amended Petition in Quo Warranto.)

ARGUMENT.

A. THE DECISION BELOW RESTS UPON ADEQUATE NON-FEDERAL GROUNDS OF DECISION.

1. The District Court of Appeal held that respondents' acts did not violate section 95 of the California Penal Code. This decision rests upon the construction of the state statute. Petitioner's theory was that respondents, by publishing the general advertisements, had violated section 95 of the California Penal Code, and that because of this violation of the Penal Code *quo warranto* lay against respondents under section 4690 of the California Corporations Code and sections 803 and 809 of the California Code of Civil Procedure.[3] Basically, therefore, as petitioner itself says, the cause of action "depends upon whether the insurance companies have violated the laws of the State" (Pet., p. 4).

After considering an earlier California decision construing section 95 (*People v. Connors* (1924) 70 Cal.App. 315, 233 Pac. 362 (Opinion, Pet., Appx., pp. 13-14)), the court held that section 95 was limited to attempts to influence jurors in specific pending cases, a situation not present in the advertisements in question here. The court found (Opinion, Pet., Appx., p. 13):

> "The advertisements here in question amount to a generalized discussion of a particular topic—the

[3]Respondents contended in the state court that, as a matter of law, neither section 4690 of the California Corporations Code nor sections 803 and 809 of the California Code of Civil Procedure authorize this proceeding for forfeiture of their corporate rights, even if their acts constituted a violation of section 95 of the Penal Code. This point was not passed upon by the District Court of Appeal.

claimed excessive awards in negligence cases. There is no effort made to influence a particular decision."

In construing the California statute the state court considered the free speech and free press guarantees in both the Federal and state constitutions—and necessarily would have been required to base its judgment on a decision of those questions had it found the statute applicable. However, its ultimate decision rested upon the construction of the statute, and that construction is binding upon this court (*Albertson v. Millard* (1953) 345 U.S. 242, 244; *Beauharnais v. Illinois* (1952) 343 U.S. 250, 253; *Kovacs v. Cooper* (1949) 336 U.S. 77, 85).

2. As just noted, the state court gave careful consideration to the constitutional questions relating to freedom of speech and freedom of the press but placed its ultimate decision on the construction of the state statute. However, even if it were considered that the judgment rested upon the decision of the constitutional issues, it would rest equally on state and Federal constitutional provisions and thus would be supported by an adequate non-Federal ground of decision (*Lynch v. New York* (1934) 293 U.S. 52[4]).

In referring to the constitutional provisions involved, the state court laid equal stress upon both state and

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[4]Under the facts stated in the following pages of this brief, *Minnesota v. National Tea Co.* (1940) 309 U.S. 551 and like decisions are inapplicable.

Federal constitutions.[5] In its opinion the court said (Pet., Appx., pp. 12-13):

> "It must also be remembered that appellant in this proceeding seeks to restrain respondents from further utterance of their sentiments on claimed excessive jury verdicts or to oust them from carrying on their corporate business in the State of California. Manifestly, this is an attempt at prior restraint upon publication and in essence amounts to censorship, denounced by the state and federal Constitutions in their protection of freedom of speech and press. • • • We are persuaded that the *quo warranto* statutes in this state deal with forfeiture and suppression of corporate rights, and not with publications *per se*, and their use is not permitted to effect restraint upon publication—which is the essence of censorship."

In support of this ruling the court cited not only Federal cases construing the Federal Constitution but also state cases construing the provisions of the Constitution of California. Among others, it relied upon the early deci-

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[5] "• • • we shall first give consideration to respondents' claim that their demurrer was properly sustained because this proceeding constitutes a form of prior restraint upon publication barred by the free speech and free press provisions of the federal and state Constitutions (U. S. Const., Amend. I and XIV, §1; Cal. Const., art. I, §9)" (Opinion, Pet., Appx., p. 7).

"• • • the framers of our Constitution and Bill of Rights, as well as those who brought into being our own California Constitution, recognized" etc. (Opinion, Pet., Appx., p. 7.)

"Manifestly, this is an attempt at prior restraint upon publication and in essence amounts to censorship, denounced by the state and federal Constitutions in their protection of freedom of speech and press" (Opinion, Pet., Appx., p. 12).

"On the basis of the facts alleged in the amended petition, the maintenance of *quo warranto* proceedings against respondent must be held, under the authorities herein cited, to amount to an infringement upon rights guaranteed respondents by the federal and state Constitutions" (Opinion, Pet., Appx., p. 15).

sion in *Dailey v. Superior Court* (1896) 112 Cal. 94, 97, 44 Pac. 458 (Opinion, Pet., Appx., p. 12), where the Supreme Court of California held that restraints such as those sought here to be imposed would infringe "upon rights guaranteed to every citizen by section 9, article I, of the constitution of this state."

Clearly, therefore, the ruling of the District Court of Appeal, in so far as it may be considered as resting upon decision of constitutional questions, is independently based upon the provisions of the Constitution of the State of California.

B. THE DECISION OF THE STATE COURT IS CORRECT AND IS NOT IN CONFLICT WITH BEAUHARNAIS v. ILLINOIS, 343 U.S. 250.

For the reasons stated in the opinion of the California District Court of Appeal, the right of respondents to publish in a magazine of wide circulation their sentiments on a matter of general public interest is, we submit, clearly protected by the free speech and free press guarantees of the state and Federal constitutions. Petitioner's contention that the decision of the court below is in conflict with the decision in *Beauharnais v. Illinois* (1952) 343 U.S. 250, is without merit.

In the *Beauharnais* case this court was concerned with admittedly libelous false charges that certain persons were rapists, robbers, carriers of knives and guns and users of marijuana. It held such libelous utterances were not within the area of constitutionally protected speech. Quoting from *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571-572, the court said (343 U.S. 255-257):

"'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut,* 310 U.S. 296, 309-310.'"

The advertisements concerning excessive jury verdicts challenged in this case do not come within the "well-defined and narrowly limited classes of speech" above referred to. Petitioner cannot seriously contend that "the lewd and obscene, the profane, the libelous, [or] the insulting or 'fighting' words" can be found in these advertisements. Whether one agrees or disagrees with the ideas expressed in the advertisements, they are indubitably a part of any exposition of a problem of wide concern. Careful research fails to reveal a single instance in which a court anywhere has sustained an attempt either to suppress or punish comment of this kind. On the contrary, three other courts have considered, in attempted contempt proceedings, the identical advertisements here involved, and in each case (although the appeals turned on

jurisdictional grounds) the comments of the court indicate complete agreement with the conclusions of the state court in the case at bar.

Hendrix v. Consolidated Van Lines (1954) District Court, Sedgwick County, Kansas, Case No. A-43376; appeal dismissed (1954) 176 Kan. 101, 269 P.2d 435;

Hoffman v. Perrucci (E.D.Pa. 1953) 117 F.Supp. 38; appeal dismissed (3 Cir. 1955) 222 F.2d 709;

United States v. American Machinery Co. (E.D. Wash. 1953) 116 F.Supp. 160.

CONCLUSION.

The decision below is independently supported by non-Federal grounds. It is clearly correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Dated: San Francisco, California,
September 29, 1955.

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(Appendix Follows.)

Appendix

Calif.Pen.Code, sec. 95:

"Every person who corruptly attempts to influence a juror, or any person summoned or drawn as a juror, or chosen as an arbitrator, or umpire, or appointed a referee, in respect to his verdict in, or decision of any cause, or proceeding, pending, or about to be brought before him, either:

One. By means of any communication, oral or written, had with him except in the regular course of proceedings;

Two. By means of any book, paper, or instrument exhibited, otherwise than in the regular course of proceedings;

Three. By means of any threat, intimidation, persuasion, or entreaty; or,

Four. By means of any promise, or assurance of any pecuniary or other advantage;

—Is punishable by fine not exceeding five thousand dollars, or by imprisonment in the state prison not exceeding five years."

Calif.Corp.Code, sec. 4690:

"The Attorney General may bring an action against any corporation or purported corporation, in the name of the people of this State upon his own information, or upon complaint of a private party, to procure a judgment dissolving the corporation and annulling, vacating, or forfeiting its corporate existence upon any of the following grounds:

(a) The corporation has seriously offended against any provision of the statutes regulating corporations.

(b) The corporation fraudulently has abused or usurped corporate privileges or powers.

(c) The corporation has violated any provision of law by any act or default which under the law is a ground of forfeiture of corporate existence."

Calif.Code Civ.Proc., secs. 803, 809:

"An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor" (sec. 803).

"When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state" (sec. 809).